IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

EMMET P. BURKE,

Petitioner,

vs.

EVERETT T. CARPENTER, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMMET P. BURKE

515 N. Buena Vista St.
Burbank, California
91505

Petitioner in Pro Per

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CITATION TO OPINION BELOW

The Decision of the U. S. District Court for the Central Division of California was by means

of a memorandum opinion which is unreported. (The grounds of the District Court decision are reviewed in the opinion of the Court of Appeals.) The opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix "A".

JURISDICTION

The jurisdiction of the District Court is found in Title 5 U. S. C. §1009(a). Court of Appeals jurisdiction is found in Title 28 U. S. C. §1291. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Also see Rule 19 (1) (b).

STATUTES INVOLVED

The Veteran Preferance Act of 1944, §§ 2, 12 and 14. The Statutes whose Construction is involved herein are found in Appendix "B".

QUESTIONS TO BE DECIDED

1. Whether the Post Office Department's personnel action of notification of restoration to active duty as Postmaster in compliance with Civil Service Commission's reversal and mandatory legal provisions can be modified by subsequent unilateral notice denying the faculties of restoration, and whether such conduct is a denial

of rights guaranteed under the Fifth Amendment relating to due process of law?

2. Whether the Post Office Department's failure to retain and give proper notice of such retention to a ten-point veteran in a transfer or functions wherein non-veteran personnel is retained and transferred thereto is a denial of due process of law?

3. Whether the Post Office Department's pre-determined and pre-announced decision to reduce the petitioner from Postmaster PFS9 to Regular Clerk PFS4 long before an adverse action is instituted constitutes a denial of due process of law?

The petitioner, a ten-point veteran of World War II and seventeen years with the federal government, was appointed Postmaster at Universal City, California on September 21, 1959. In a letter from Washington dated June 20, 1961 (TR 81B) he was advised that the Post Office Department had decided to consolidate the Universal City post office (which enjoyed record revenues) with that of North Hollywood, California and reduce him from Postmaster PFS9 to clerk PFS4. Examples of the Department's pursuit of this predetermination are shown by the Regional Director's letters to the petitioner dated July 6, and October 27, 1961 (TR 19, A6, A7). The petitioner's letter of July 20, 1961 (TR 81A) reminded him that as a ten-point veteran the former was entitled to retention in grade at the facility if it were converted, in keeping with §§ 2 and 12 of the Act.

On January 31, 1963, the Department announced in its national Postal Bulletin (TR 81E) that the post offices were being consolidated on April 12, 1963. The petitioner did not receive 30 days advance notice that his rank was being abolished and that he was being retained at the unit in accordance with §§ 12 and 14 of the Veterans Preference Act of 1944. Instead, on March 20, 1963, adverse action against him was instituted (TR 19, A8). It was based on irregularities more than four months old which had been corrected. When the petitioner pointed out that the advance notice proviso of the Act was being violated the closing date was changed to May 10, 1963. The Regional Director advised the petitioner in a letter dated April 15, 1963, that he was being reduced to clerk status effective May 10, 1963, because of the consolidation (TR 19, A10). On April 29, 1963 (TR 19, A13) Washington postal officials advised the petitioner that the charge against him was sustained and reaffirmed the clerk status effective May 10, 1963. He has been in that status continuously since. At no time did the Department extend him the benefit of §12 in the consolidation or transfer of functions and non-veteran personnel was retained and transferred into the facility.

An appeal followed and the Post Office Department was reversed on November 1, 1963 by the Board of Appeals and Review of the U. S. Civil Service Commission (TR 19, A18). The petitioner was notified by the Department that he was restored to active duty as Postmaster, Universal City, California, effective November 12, 1963 (TR 19, A20). In fact he was not restored

to Postmaster or any comparable position. On December 3, 1963, the Department unilaterally advised him (TR 19, B-13) that he was being retained in clerk status. On December 5, 1963, a second adverse action against him was instituted based on the same old irregularities which had been corrected long since. On January 17, 1964 (TR 19, A28) the Department again sustained the action. After exhausting administrative channels the petitioner filed a complaint in the U. S. District Court for the Central Division of California on December 10, 1965. He charged that his reduction in rank was wrongful because of procedural violations and arbitrary and capricious action by the Post Office Department, and asked for restoration to his former grade. The government moved for summary judgment and it was granted in a memorandum opinion dated November 28, 1966. The petitioner appealed to the United States Court of Appeals for the Ninth Circuit and oral arguments were heard on December 6, 1967. The decision affirming the opinion of the District Court was announced on December 15, 1967 and judgment was entered on that date.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING CERTIORARI

1. The Decision Below Conflicts With Decisions Of This Court And Other Circuits.

In Reynolds v. Lovett (1952), F. 2d 181, the court held that the agency had followed its own will and disregarded the will of Congress. Similarly the Post Office Department's letter to the Civil Service Commission of November 1, 1963, restoring the petitioner to active duty while its private letter of December 3, 1963, to the petitioner denies him that right.

In Hilton v. Sullivan, 334 U. S. 323, it was held that Civil Service Regulations giving absolute preference to veterans of World War II are valid even though under them veterans are retained in preference to non-veterans who have longer government service.

In United States v. General Motors, 323 U.S. at 373, the court held property is not a thing -- it is a right or group of rights.

In Elder v. Brannon (1951), 351 U. S. 288, the court held that retention rights are governed by §12. Public law 89-554 reaffirms this right. None of the cases cited by the Appellate Court refer to ten point veterans.

2. The Decision Below Creates A Doubt As To What Constitutes A Deprivation Of A Constitutionally Protected Right.

The decision below purports to reach its result partly upon the fact that the petitioner was denominated a Postmaster by the Department in its response to the reversal by the Board of Appeals and Review. In Feldman v. The United States (1960), the court held that whenever the Commission disapproves the action taken by the agency it shall restore the employee to active duty. In Flanagan v. Young (1955), 228 F. 2d 466, the court reaffirmed that the Veterans Preference Act is to be construed whenever possible in favor of the veteran. The Department's advance decision to reduce the petitioner denies true discretion and due process. The laws protecting veterans go back almost a hundred years and even today are being strengthened in the halls of Congress. Because of the importance of the protection of the rights of those who protected this country and suffered wounds in the process it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

EMMET P. BURKE

In Propria Persona

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMMET P. BURKE,	)	
	)	
Appellant,	)	
vs.	)	No.
	)	21,614
EVERETT T. CARPENTER, Etc., et al.,	)	
	)	
Appellees.	)	
	)	

[December 15, 1967]

Appeal from the United States District Court For the Central District of California

Before: MERRILL and BROWNING, Circuit Judges, and SOLOMON, District Judge

PER CURIAM:

This is an appeal from a summary judgment granted by the district court in a suit brought by appellant to obtain judicial review of the Post Office Department's reduction of his grade from

Postmaster, PFS Level 9, to Clerk, PFS Level 4. The district court filed a memorandum opinion in which it carefully analyzed the administrative record in the light of appellant's contentions and concluded that the agency had complied with required procedures, that its factual determinations were supported by substantial evidence, and that its action was not arbitrary, capricious, or an abuse of discretion. We agree, and the judgment must therefore be affirmed. Mancilla v. United States, 382 F. 2d 269, 270 (9th Cir. 1967); Baum v. Zuckert, 342 F. 2d 145, 147 (6th Cir. 1965); Seebach v. Cullen, 338 F. 2d 663, 664 (9th Cir. 1964). Whether we would have thought the reduction in grade which the agency ordered the appropriate action in the circumstances had the judgment been ours to make is of course immaterial.

Affirmed.

APPENDIX "B"

The Veterans Preference Act of 1944, 58 Stat., 78th Cong., 2nd Session, Ch. 287 - June 27, 1944.

Section 2, Title 5 U.S.C. 851:

"In certification for appointment, in reinstatement . . . in reemployment and in retention in civilian positions in all establishments, agencies, bureaus . . . perference shall be given to (1) those ex-service men and women . . . who have established the present existence of a service-connected disability . . ."

Section 12, Title 5 U.S.C. 861; (See also Public Law 89-554 §3503):

"In any reduction in any civilisn service of any Federal agency . . . all preference employees shall first be transferred . . . before such agency shall appoint additional employees from any other source for such positions."

Section 14, Title 5 U.S.C. 863; (See also Title 5, §7701):

"No permenent or indefinite preference eligible . . . shall be discharged . . . reduced in rank or compensation . . . except for such cause as will promote the efficiency of the service . . . and for reasons given in writing . . .

and the person . . . whose reduction in rank . . . is sought shall have thirty days advance written such preference eligible shall be allowed reasonable time for answering the same personally and in writing and shall have the right to appeal to the Civil Service Commission from an adverse decision . . . Provided that such preference eligible shall have the right to make a personal appearance . . . after investigation the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and send copies of the same to the appellant. . . . and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends."

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No. 1233

In the Supreme Court of the United States

OCTOBER TERM, 1967

EMMET P. BURKE, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1233

EMMET P. BURKE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On December 15, 1967, the court of appeals affirmed the district court's determination that the Post Office Department's action in reducing petitioner's employment grade was lawful (Pet. App. A–1). The petition for writ of certiorari was filed 91 days thereafter, on March 15, 1968.[1]

Section 2101(c) of Title 28 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

[1] Petitioner did not seek reconsideration in the Ninth Circuit or obtain an extension of time within which to file his petition for a writ of certiorari.

297-210—68

Since these limits are jurisdictional, the petition should be dismissed as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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October Term 1967

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PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMMET P. BURKE

515 N. Buena Vista St.
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Petitioner did everything possible to insure timely filing and repeatedly told printers it

must be in the custody of the Supreme Court not later than the 90th day after December 15, 1967. Their failure caused the delay and petitioner himself took the papers from them and dispatched same, Air Mail, Special Delivery, on the morning of March 14, 1968, on the 90th day. The Petition was docketed on March 15, 1968 and petitioner was not advised by the clerk that it was untimely. 1/ In the interest of justice, it is prayed that the Petition be accepted for consideration on its merits.

Respectfully submitted,

EMMET P. BURKE

Petitioner in Pro Per

1/ The postal money order for the filing fee was dated March 11, 1968. The respondent's memorandum was not received by petitioner until April 19, 1968.

April 1968

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